No. 18,674

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERT H. NEWTON and GENEVIEVE NEWTON,
Plaintiffs-Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, MANUFACTURERS LIFE INSURANCE COMPANY, a corporation, and DOMINION LIFE ASSURANCE COMPANY, a corporation,
Defendants-Appellees and Third Party Plaintiffs-Appellants.

PETITION FOR REHEARING BY APPELLEES MANUFACTURERS LIFE INSURANCE COMPANY AND THE DOMINION LIFE ASSURANCE COMPANY

BURTON L. WALSH,
RICHARD J. KILMARTIN,
KNIGHT, BOLAND & RIORDAN,
465 California Street, San Francisco 4, California,
Attorneys for Appellee Manufacturers Life Insurance Company.

EUGENE M. PRINCE,
JOHN B. BATES,
NOBLE K. GREGORY,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco 4, California,
Attorneys for Appellee The Dominion Life Assurance Company.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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This Petition for Rehearing is filed by the Appellees Manufacturers Life Insurance Company and The Dominion Life Assurance Company only. These Petitioners issued only single premium deferred refund annuities in this case and this Petition is, therefore, addressed solely to the opinion of this Court insofar as it pertains to annuity contracts. It is respectfully submitted that a rehearing should be granted Petitioners in this case for the following reasons:

1. This Court committed serious and patent error in refusing to give any meaning to the incontestable clauses contained in the annuity contracts involved in this action. This refusal is contrary to the mandate of California law, which this Court is bound to follow in this case, and is violative of basic and fundamental principles of contract construction.

2. This Court erred in making the following statement at page 6 of its opinion after referring to a dictum in the case of *Donohue v. New York Life Insurance Company,* 88 F.Supp. 594:

> "That is all the courts have said on the subject in any case in which comment was relevant."

This statement totally ignores all of the cases cited by the Trial Court in its Decision and by Appellees in their brief which comment that an incontestable clause operates in favor of both parties to the contract.*

3. This Court erred on page 6 of its opinion in accepting Appellants' speculative argument that in certain cases cited by them an incontestable clause, if applicable, would have won the Company's case for it. This portion of the Court's opinion has ignored the obvious fact that an in-

*Petitioners further question the significance of the asserted "fact" that no insurance company, except in the *Donohue* case, "in reported litigation" has asserted the clause as a defense. There may well be many instances where the clause was successfully relied on and no appeal was taken. Except in the federal courts, practically no trial court decisions are reported.

contestable clause could not have been pertinent to the decisions in those cases.

4. This Court erred at page 7 of its opinion in referring to or drawing any conclusion from the irrelevant fact that a so-called "impaired annuity" may be secured in some instances. No such contracts are involved in this case. The contracts involved in this action are in evidence and available for the Court's examination. Each contract is a single premium deferred refund annuity, and not an impaired annuity. Accordingly, the Court's hypothetical observations not only have no basis in the Record of this case but are totally immaterial to the issue presented for decision.

5. This Court has misconceived the meaning of the statement appearing at page 100 of Annuities and Their Uses, 2nd Ed., by Clyde J. Crobaugh (1933):

> "The incontestable clause is for the benefit of the annuitant. It would be an undesirable condition if the payment of the annuity could be disputed by the insurer many years after the contract had been issued when it might be difficult for the annuitant to submit proof of statements (except as to age and identity) made at the time the contract was secured."

There are no annuity contracts involved in this action which were issued upon statements made by the applicant other than as to age and identity. Accordingly, the quoted text has no application to this case at all. Respectfully, however, it must be stated that the quoted matter has been taken out of context by this Court and to derive the true meaning of this statement, Mr. Crobaugh's entire book must be considered. Occasionally an annuity contract is combined with some form of *insurance* feature such as an accidental death benefit or disability benefits. These added features provide true insurance protection and not annuity benefits. Statements made by the applicant to secure these insurance benefits obtain the protection of an incontestable clause. Similarly, there are certain

contracts which bear the label "annuity" which are in reality life insurance policies and not annuity contracts. For example, at page 71 of Mr. Crobaugh's text, he describes a survivorship annuity which is nothing more than a life insurance policy on one person, payable in the form of an annuity to the beneficiary upon the death of the life insured. While such contracts are called annuities, it is obvious that they are in reality life insurance policies. It is equally obvious that an incontestable clause in such a contract could benefit the insured who is called, for the purpose of the contract, the annuitant. It was to such "annuitants" that Mr. Crobaugh obviously referred when he made the above statement. Such statement has no application to the annuitants or annuities involved in this case.

6. The State of California has no statute requiring an incontestable clause to be contained in an annuity contract and New York law referred to at page 7 of this Court's opinion has no bearing on the issue presented to the Court for determination. It is apparent, however, that this Court has misconstrued the meaning of State statutes requiring an incontestable clause in annuity contracts. The requirement of incontestability in such statutes is directed only toward contracts issued upon statements made by the annuitant in his application other than statements as to age and identity. No such statements are involved in this case.

7. This Court erred in its conclusion at page 8 of the opinion, viz.:

> "It (an incontestable clause) does have a place in some annuity contracts, and therefore it is not remarkable that it gets written into others where it serves no purpose."

This Court has gone off the record to consider the purpose an incontestable clause might serve in a hypothetical annuity contract not involved in this case. Petitioners, therefore, feel warranted in stating that neither at the time the contracts involved in this action were issued, *nor*

at any time prior thereto, did either Petitioner issue so-called impaired annuity contracts. Therefore, contrary to this Court's holding, it would be indeed "remarkable" that the incontestable clause was written into the instant contracts by Petitioners' draftsmen as an erroneous extension of a type of contract never written by either Petitioner. The record is devoid of any matter upon which the Court's holding may be predicated.

8. This Court has erred in failing to consider the nature of an annuity contract in reaching its decision. In the text cited by the Court—Annuities and Their Uses—the author states at page 26:

> "It may be said that the annuity idea is practically the reciprocal of the life insurance principle."

This quotation forcefully demonstrates the validity, soundness and accuracy of the District Court's conclusion that:

> "The basic reasons for the hypothesis that an incontestability clause benefits the insured appear to be the same with reference to an annuity company, for in such a situation it is the annuitant (like the insurance company insurer in the life insurance situation) who bears the risk of loss. Accordingly, as to the annuity contracts here involved, this is a second and separate reason why the incontestable clauses should inure to the benefit of the issuing companies."

Prior to rendering the decision in this case, the District Court, over a period of seven months, explored all facets of the issue presented. Numerous memoranda of law were required and filed, followed by the District Court's independent research. The resultant decision is predicated upon irrefutable logic and upon a strict adherence to applicable legal principles and mandate set down by the United States Supreme Court, this Court, and the Appellate Courts of California. In contradistinction, the ultimate conclusion of this Court, with respect to the annuity contracts, is based upon a patent non sequitur and a

serious and apparent departure from controlling legal concepts. The annuity contracts involved in this action had a value in excess of $530,000.00. This Court has held, in effect, that the incontestable clauses contained in these contracts were inserted by *mistake.* Such a holding is not only not supported by the Record but appears to be without judicial precedent.

In basic fairness to not only the litigants but to the Trial Judge, a rehearing should be granted or the matter heard en banc so that further consideration can be given to the issue presented. This Court has directed that the cause be remanded to the District Court for further proceedings. At a very minimum, the decision herein should be modified to inform the Trial Court whether the further proceedings directed by this Court may include the reception of evidence to prove that such clauses were not included in the annuity contracts by inadvertence or mistake.

Respectfully submitted,

BURTON L. WALSH,
RICHARD J. KILMARTIN,
KNIGHT, BOLAND & RIORDAN,
Attorneys for Appellee
Manufacturers Life Insurance Company.

EUGENE M. PRINCE,
JOHN B. BATES,
NOBLE K. GREGORY,
PILLSBURY, MADISON & SUTRO,
Attorneys for Appellee
The Dominion Life Assurance Company.

Certificate of Counsel Responsible for the Preparation of This Petition for Rehearing

I certify that I am one of the attorneys responsible for the preparation of this Petition for Rehearing; that in my judgment it is well-founded and it is not interposed for delay.

Richard J. Kilmartin.